



September 26, 2014

President Mildred Garcia
California State University, Fullerton
Office of the President
2600 Nutwood Avenue, CP-1000
Fullerton, California 92381

Sent via United States Mail and Facsimile (657-278-1322)

Dear President Garcia:

The Foundation for Individual Rights in Education (FIRE) unites leaders in the fields of civil rights and civil liberties, scholars, journalists, and public intellectuals across the political and ideological spectrum on behalf of liberty, legal equality, academic freedom, due process, freedom of speech, and freedom of conscience on America's college campuses. Our website, thefire.org, will give you a greater sense of our identity and activities.

FIRE is gravely concerned by California State University, Fullerton's (CSUF's) punishment of a sorority on the basis of a theme party at which several students wore costumes deemed offensive by others in the CSUF community. CSUF has declared the sorority guilty of numerous conduct charges, including "disruption" of university activities, "infring[ing] on the rights" of others, and even "threaten[ing] or endanger[ing] the health and safety" of other CSUF students, solely on the basis of the sorority members' protected expression. Consistent with CSUF's legal and moral obligations under the First Amendment, these unconstitutional findings must be rescinded immediately, and the sanctions imposed must be reversed.

I. Factual Background

The following is our understanding of the facts. Please inform us if you believe we are in error.

On August 19, 2014, CSUF's Alpha Delta Pi (ADP) sorority held a "Taco Tuesday"-themed recruitment event. According to the student newspaper the *Daily Titan*, "[n]inety-three percent of the sorority members attended the event, and of those, 90

percent came in costume,” though the sorority did not request that members do so. The *Daily Titan* reported that the costumes worn at the party included “sarapes, sombreros and in some cases, gang costumes.” Perhaps in response to complaints about the event’s theme, ADP agreed to participate in a “Voluntary Administrative Review” meeting with Dean of Students Tonantzin Oseguera on August 29. An undated follow-up letter from Oseguera listed the Standards for Student Conduct violations she had determined the sorority had committed, stating that “the perception and gross lack of judgment on the part of the leadership and its members disregarded our University’s mission of diversity and your own Chapter’s guiding principles.” Oseguera’s letter lists the sorority’s violations of the Standards for Student Conduct as follows:

- (3) Willful, material and substantial disruption or obstruction of a University-related activity, or any campus activity.
- (4) Participating in an activity that substantially and materially disrupts the normal operations of the University, or infringes on the rights of members of the University community.
- (5) Willful, material and substantial obstruction of the free flow of pedestrian or other traffic, on or leading to campus property or an off-campus University related activity.
- (6) Disorderly, lewd, [indecent], or obscene behavior at a University related activity, or directed toward a member(s) of the University community.
- (7) Conduct that threaten[s] or endangers the health or safety of any person within or related to the University community, including physical abuse, threats, intimidation, harassment, or sexual misconduct.
- (16) Violation of any published University policy, rule, regulation or presidential order.
- (20) Encouraging, permitting, or assisting another to do any act that could subject him or her to discipline.

The sanctions Oseguera imposed on the sorority include disciplinary probation for the sorority through December 31, 2015; a requirement that the sorority “coordinate a mandatory workshop on cultural competencies and diversity”; mandatory completion of a “bystander intervention workshop”; “development of a cultural competency/diversity workshop” for new members; and the “[d]evelopment of [a] ‘we are a culture not a costume’ campaign to showcase for all CSUF students.”

II. Analysis

The costumes worn by attendees of ADP’s party constitute expressive activity protected by the First Amendment. CSUF had no basis to investigate ADP or to compel ADP’s participation in its disciplinary process, and it has no basis now to compel it to choose

between accepting a “voluntary” agreement or risk facing a formal hearing. To be clear: The conduct charges and sanctions levied against ADP are unconstitutional and meritless, and must be rescinded immediately.

That the First Amendment is fully binding on public universities like CSUF is settled law. *See Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981) (“With respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities.”); *Healy v. James*, 408 U.S. 169, 180 (1972) (“[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, ‘the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’”) (internal citation omitted).

The Supreme Court has also repeatedly held that speech may not be punished merely because many may find it to be offensive or disrespectful. *See Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (“[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”).

It is clear that the charges and sanctions against ADP are entirely based on the content of attendees’ expression—that is, on the costumes attendees wore. Dean Oseguera admitted as much in stating to the *Daily Titan* that “we have concluded that the women were responsible for the event, that it’s definitely grossly inappropriate.” Moreover, the nature of the sanctions against ADP leaves no doubt as to the university’s motives for imposing them. The punishment of ADP members’ *expression* is made all the more troubling by the fact that the student code provisions held against ADP are intended to curb not expression but unwanted and unlawful *conduct*. The misapplication of conduct policies in this manner is sure to chill student expression that CSUF is legally bound to protect, and sets an unacceptably low threshold for investigating and punishing speech.

Every charge against ADP fails, and by a wide margin. We address them now in turn.

A. ADP’s expression is not punishable as “disruption” or “obstruction.”

CSUF accused ADP of “[w]illful, material and substantial disruption or obstruction” of university activities; “[p]articipating in an activity that substantially and materially disrupts the normal operations of the University”; and “[w]illful, material and substantial obstruction of the free flow of pedestrian or other traffic.” That ADP’s recruitment event could constitute anything close to the physical impediment to CSUF’s operations envisioned by these conduct prohibitions is so remote as to be virtually inconceivable. If ADP’s only perceived offense stems from the attire of party attendees,

which is indisputably protected under the First Amendment, then no disruption of university activities occurred, and the university suffered no obstruction or interruption of its administrative functions.

Nor may CSUF lodge these charges based on a theory that reaction to the ADP event constitutes, or could lead to, disruption. The Supreme Court has repeatedly held that it is impermissible to punish or regulate speech based on the subjective offense taken by listeners. *See, e.g., Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134–35 (1992) (“Speech cannot be financially burdened, *any more than it can be punished or banned*, simply because it might offend a hostile mob.”) (emphasis added). *See also Ctr. For Bio-Ethical Reform, Inc. v. Los Angeles County Sheriff Dep’t*, 533 F.2d 780, 789 (9th Cir. 2008) (“Plaintiffs’ speech was permitted until the students and drivers around the school reacted to it, at which point the speech was deemed disruptive and ordered stopped under § 626.8. This application of the statute raises serious First Amendment concerns.”).

Similarly, any notion that ADP “infringe[d] on the rights of members of the University community” because of the expression of those who attended its party must be immediately discarded. Such a violation is possible only if CSUF believes that there exists a “right not to be offended”—an entitlement that the First Amendment does not permit on public university campuses. *See Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667, 670 (1973) (“[T]he mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of ‘conventions of decency.’”).

B. ADP’s expression is not punishable as “[d]isorderly, lewd, [indecent], or obscene behavior.”

As this letter has already made clear, the partygoers’ expression is wholly protected by the First Amendment and—again, assuming ADP’s sole offense is to have offended others with the attire of those attending its party—not punishable as any kind of prohibited conduct. Speech may not be prohibited or punished because it is merely “lewd” or “indecent,” particularly because of the subjective nature of what may be considered “lewd” or “indecent.” *See Cohen v. California*, 403 U.S. 15, 25 (1971) (noting that it is “often true that one man’s vulgarity is another’s lyric”). There is no First Amendment exemption for speech subjectively considered lewd or indecent in nature, and no credible argument to be made that the partygoers’ protected expression somehow crossed the line into unprotected lewd or indecent *behavior*.

This charge especially fails where obscenity is concerned, given that term’s narrow, specific legal definition. Unprotected obscenity has been defined by the Supreme Court as only those depictions of sexual conduct that “taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.” *Miller v. California*, 413 U.S. 15, 24 (1973). There is simply no credible argument

to be made that the party attendees' various Mexican-themed costumes could have met this threshold.

C. ADP's expression is not punishable as "[c]onduct that threaten[s] or endangers the health or safety of any person."

CSUF's policy prohibits "physical abuse," "threats," "intimidation," and "harassment," among other behaviors. The party attendees' expression clearly fails to meet any of these categories of unprotected behavior. The mere fact that many of the attendees wore Mexican-themed costumes conveyed no physical threat to anyone in their vicinity.

Further, ADP's expression clearly fails to meet the standard for unprotected threats, intimidation, or harassment as understood under the law. The Supreme Court has defined "true threats" as "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003).

Likewise, *Virginia v. Black* states that "[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." There is simply no credible argument that the costumes worn by party attendees constituted a threat of unlawful violence.

Further, the Supreme Court has ruled that peer harassment in the educational context must be targeted *conduct* that is (1) unwelcome; (2) discriminatory (3) on the basis of gender or another protected status, like race; and (4) "so severe, pervasive, and objectively offensive, and ... [that] so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities." *Davis v. Monroe County Board of Education*, 526 U.S. 629, 651 (1999). By definition, this includes only extreme and unusually repetitive behavior—conduct so serious that it would prevent a reasonable person from receiving his or her education.

Furthermore, in a July 28, 2003, "Dear Colleague" letter sent to all federally funded colleges and universities, then-Assistant Secretary Gerald A. Reynolds of the Office for Civil Rights (OCR) of the U.S. Department of Education made clear that harassment "must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive." In a 2010 "Dear Colleague" letter regarding bullying, then-Assistant Secretary for Civil Rights Russlynn H. Ali explicitly reaffirmed the 2003 letter's understanding of the relationship between the First Amendment and harassment. Simply put, wearing clothing others may find offensive does not and cannot constitute actionable harassment.

D. The sanctions against ADP are unconstitutional.

FIRE is aware that ADP has apologized and expressed its regret over the appearance of the August 19 recruitment event, suggesting an apparent willingness to comply with CSUF's sanctions. This does not, however, make CSUF's sanctions any more constitutional. As this letter has demonstrated, every single charge levied and sustained against ADP by CSUF was unconstitutional, meritless, and demonstrably misapplied for the punishment of protected speech. CSUF may not coerce ADP into complying with sanctions for conduct violations the university had no grounds to bring in the first place. In light of CSUF's wholly meritless case against ADP, no less than the elimination of all sanctions against the sorority is required.

Particularly objectionable among the numerous sanctions with which ADP is being forced to comply are those involving coerced expression and the requirements that the sorority adopt particular programming to the university's sole satisfaction. This includes the "cultural competency/diversity workshop" that CSUF is requiring ADP to conduct for its new members and the "'we are not a costume' campaign" that it must present for all CSUF students. Both of these programs must either be developed in coordination with or obtain the approval of the CSUF administration before they may be presented, effectively coercing ADP into adopting whatever definitions of "cultural competency" and other vaguely defined notions CSUF considers appropriate.

ADP may, of course, develop such programs on its own and in conjunction with its national leadership and the leadership of CSUF's sorority system. But demanding that ADP adopt and publicly declare its loyalty to particular viewpoints deemed acceptable by the CSUF administration is anathema to the First Amendment ideals that CSUF as a public university is obliged to uphold, and it is incompatible with decades of Supreme Court precedent forbidding compelled speech. As the Supreme Court long ago declared, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). *See also Wooley v. Maynard*, 430 U.S. 705, 717 (1977) ("[W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message.").

III. Conclusion

CSUF's actions demonstrate a complete and inexcusable failure to take into consideration the First Amendment rights of its students. The expressive activity for which ADP has been sanctioned is unquestionably protected by the First Amendment, and the conduct charges it has been found guilty of are, to the last, meritless and unconstitutional.

FIRE calls on California State University, Fullerton to immediately dismiss all charges and rescind all sanctions against Alpha Delta Pi—the only acceptable course available to the university in accordance with its moral and legal obligations under the First

Amendment. CSUF must further make clear to students that its conduct policies will not be used to police and punish protected expression in the future. Please spare CSUF the embarrassment of a losing battle against its students' constitutional rights.

We request a response to this letter by October 10, 2014.

Sincerely,



Peter Bonilla

Director, Individual Rights Defense Program

cc:

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Tonantzin Oseguera, Dean of Students

Lea Jarnagin, Associate Vice President for Student Affairs

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